(1)

FILED

97-1416 MAR 2 1998

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PATRICK J. EARTHLY; JERRY LAFAYETTE, a minor, by and through his Guardian ad Litem, Audrey Bowen; BRANDON NASH, a minor, by and through his Guardian ad Litem, Yolanda Nash; BRENT NASH, a minor, by and through his Guardian ad Litem, Yolanda Nash; MOACIR JONES, a minor, by and through his Guardians ad Litem, Ralph and Cheryl Jones; JOMO KENYATTA, a minor, by and through his Guardian ad Litem, Jayne Somogy; RICHARD V. HILL; and ANDREA HILL,
Petitioners,

vs.

CITY OF BEVERLY HILLS; MARVIN IANNONE, individually and in his official capacity; ALLAN ALEXANDER, individually and in his official capacity; VICKI REYNOLDS, individually and in her official capacity; ROBERT P. CURTIS, individually and in his official capacity,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT R. BRINA, JR.
Counsel of Record

CASE & BAKER, LLP

575 Anton, Suite 1000
Costa Mesa, California 92626
(714) 540-3636

ROBERT K. TANENBAUM
9777 Wilshire Boulevard, Suite 1009
Beverly Hills, California 90212
(310) 859-6610

MICHAEL W. FITZGERALD
LAW OFFICES OF ROBERT L. CORBIN
601 West Fifth Street, 12th Floor
Los Angeles, California 90071-2025
(213) 612-0001

Attorneys for Petitioners

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

61 pp

QUESTIONS PRESENTED

1) May an appellate court exercise jurisdiction over an interlocutory appeal by governmental officials asserting the defense of qualified immunity where the district court has ruled, on summary judgment, that triable issues of material fact exist regarding evidence of officials' alleged participation in, or their conscious condonation of, sham investigations of racially motivated police stops?

2) Whether the test of "objective legal reasonableness," asserted at summary judgment pursuant to a qualified immunity defense, precludes, in its proper application, consideration of governmental officials' actual intent, where Petitioners have claimed that the officials participated in, or consciously condoned, sham investigations of racially motivated police stops.

LIST OF PARTIES TO THE PROCEEDING

Petitioners Patrick J. Earthly, Jerry Lafayette, Moacir Jones, Jomo Kenyatta, Brent Nash, Brandon Nash, Richard Hill and Andrea Hill are each individual citizens residing within the State of California.

Respondent City of Beverly Hills is a municipality located within the State of California. Respondent Marvin Iannone, an individual, is the Chief of Police for the City of Beverly Hills. Respondent Robert Curtis, an individual, is a Police Captain in the City of Beverly Hills Police Department, in charge of the Field Operations Bureau. Respondent Allan Alexander, an individual, was formerly the Mayor, and a City Council member, of the City of Beverly Hills. Respondent Vicki Reynolds, an individual, was a former Mayor, and is a present City Council member, of the City of Beverly Hills.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES TO THE PROCEEDING.....ii

TABLE OF AUTHORITIES.....vi

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISION INVOLVED.....2

STATEMENT OF THE CASE.....3

I. District Court Proceedings.....3

A. Initial and Amended Complaints of Petitioners.....3

B. Summary Judgment Proceedings and the Factual Dispute Regarding the Participation of the City Manager and City Council in the Respective Earthly Investigations.....6

C. Rationale of the District Court's Decision.....9

II. The Ninth Circuit's Asserted Ground For Exercising Jurisdiction In This Case Forms The Basis For The Questions Presented To This Court.....11

III. The Ninth Circuit Panel Elected To Exclude From Its Consideration Of The Interlocutory Appeal and Cross-Appeal Petitioner's Claims Of Due Process Of Law.....16

REASONS FOR GRANTING THE WRIT.....18

I. The Decision of the Ninth Circuit Panel Conflicts With Other Sister Circuit Decisions and The Ninth Circuit's Own Interpretation of Qualified Immunity and the Scope of Appellate Jurisdiction on Interlocutory Appeal.....18

II. This Petition Presents An Important Question As To The Viability of the Harlow-Anderson Test of Objective Legal Reasonableness.....23

III. The Ninth Circuit Panel's Conclusion That Petitioners *Had Waived* Their Central Claims of Due Process Violations Is *In Clear Defiance* Of The *Established* Facts Of The Underlying Record.....24

CONCLUSION.....29

APPENDIX A

Opinion, Ninth Circuit Court of Appeals, Filed October 10, 1997.....A1

APPENDIX B

Order of Ninth Circuit Court of Appeals, filed December 1, 1997, denying petition for rehearing and suggestion for rehearing *en banc*.....B1

APPENDIX C

Minute Order of U.S. District Court
Filed April 2, 1996.....C1

APPENDIX D

Reporter's Transcript of U.S. District Court
Proceedings on Summary Judgment (April 2, 1996)
(Excerpts).....D1

TABLE OF AUTHORITIES

Page

Cases

Albright v. Oliver,
___U.S.___,
114 S. Ct. 807, 127 L. Ed. 2d 114 (1994).....16

Anderson v. Creighton,
483 U.S. 635, 107 S. Ct. 3034,
97 L. Ed. 2d 523 (1987).....12, 19, 23, 24

Armendariz v. Penman,
75 F. 3d 1311 (9th Cir. 1996) (*en banc*).....21, 22

Auriemma v. Rice,
910 F. 2d 1449 (7th Cir. 1990) (*en banc*),
cert. denied, 501 U.S. 1204 (1991).....20

Branch v. Tunnell,
937 F. 2d 1382 (9th Cir. 1991).....20

Broderick v. Roache,
996 F. 2d 1294 (1st Cir. 1993).....24

Chateaubriand v. Gaspard,
97 F. 3d 1218 (9th Cir. 1996).....19, 22

Crawford-El v. Britton,
93 F. 3d 813 (D.C. Cir. 1996) (*en banc*),
cert. granted, 66 U.S.L.W. 3031
(U.S. July 15, 1997) (No. 96-827).....12, 19, 23

Grant v. City of Pittsburg,
98 F. 3d 116 (3rd Cir. 1996).....13, 15, 18, 19

Harlow v. Fitzgerald,
457, U.S. 800, 102 S. Ct. 2727,
73 L. Ed. 2d 396 (1982).....12, 14, 18, 19, 23, 24

Johnson v. Jones,
___U.S.___, 115 S. Ct. 2151,
132 L. Ed. 2d 238 (1995).....19, 20, 21, 22

Martin v. District of Columbia Metro. Police Dept.,
812 F. 2d 1425 (D.C. Cir.); and
824 F. 2d 1240 (D.C. Cir. 1987).....24

Mitchell v. Forsyth,
472 U.S. 511, 105 S. Ct. 2806,
86 L. Ed. 2d 411 (1985).....13

P.B. v. Koch,
96 F. 3d 1298 (9th Cir. 1996).....12, 20

Sloman v. Tadlock,
21 F. 3d 1462 (9th Cir. 1994).....20

Tang v. State of R.I. Dept. of Elderly Affairs,
120 F. 3d 325 (1st Cir. 1997).....12, 19, 20

Statutes and Other Authorities

U.S. Constitution Amendment IV.....2, 26
U.S. Constitution Amendment XIV.....2, 26
28 U.S.C. Section 1254(1).....1
28 U.S.C. Section 1331.....3
28 U.S.C. Section 1343.....3
42 U.S.C. Section 1983.....3

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 10, 1997, and is unreported. This memorandum opinion is printed in the appendix (App. A herein, *infra*). The order of the United States Court of Appeals for the Ninth Circuit denying Petitioners' petition for rehearing and suggestion for rehearing *en banc* was entered on December 1, 1997, and is unreported. This order is printed in the appendix (App. B herein, *infra*). The minute order of the U.S. District Court (C.D. Cal.) granting in part, and denying in part, Respondents' motion for summary judgment, on the basis of qualified immunity, was entered on April 2, 1996, is unreported, and is printed in the appendix (App. C herein, *infra*). Pertinent portions of the court's transcript of the U.S. District Court's ruling at summary judgment is printed in the appendix (App. D herein, *infra*).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, *reversing* the order of the U.S. District Court (C.D. Cal.) (denying qualified immunity to Respondents Iannone and Curtis), and *affirming* the district court's order of qualified immunity for Respondents Alexander and Reynolds, was entered on October 10, 1997. The order of the United States Court of Appeals for the Ninth Circuit denying Petitioners' petition for rehearing and suggestion for rehearing *en banc* was entered on December 1, 1997. This Petition was filed within 90 days after the entry of order for denial of said petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISION INVOLVED

U.S. Const. Amend. IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. Amend. XIV, Sec. 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

The underlying civil action arose under federal question jurisdiction pursuant to Art. III, Sec. 2 of, and the Fourth and Fourteenth Amendments to, the United States Constitution. The U.S. District court properly exercised jurisdiction, in the first instance, under 28 U.S.C. Secs. 1331, 1343 (a) (3) and 1343 (a) (4), respectively.

This case arises from the respective claims of eight Petitioners, who had complained of, collectively, twenty-eight police stops, within the City of Beverly Hills during a period of twenty-four months, in the absence of "reasonable suspicion" of any wrongdoing, and had further complained of the various investigations, conducted by various municipal officials, of those same police stops. The U.S. District Court (C. D. Cal.) had denied two of the Respondents, Police Chief Iannone and Police Captain Curtis, qualified immunity, while granting qualified immunity to Respondent Alexander (then mayor) and Respondent Reynolds (City Council member). The U.S. Court of Appeals for the Ninth Circuit elected to exercise jurisdiction over the interlocutory appeal subsequently filed by Respondents Iannone and Curtis. The appellate panel for the Ninth Circuit Court of Appeals thereafter reversed the district court's order as to the denial of qualified immunity for Respondents Iannone and Curtis, and affirmed the district court's order granting immunity for Respondents Alexander and Reynolds on cross-appeal.

I. District Court Proceedings.

A. Initial and Amended Complaints of Petitioners.

Petitioners Earthly, Jones, Kenyatta, Brandon Nash, Brent Nash and Lafayette initially had filed suit on November

20, 1995, in U.S. District Court (C.D. Cal.) against Respondents, the City of Beverly Hills, Alexander, Reynolds, Curtis and Iannone, alleging, *inter alia*, two, basic propositions:

1) violation of the Fourth Amendment's protection against unreasonable seizures of their persons in the form of vehicular and pedestrian stops effected by the municipality's police department without a basis of "reasonable suspicion" that the individuals thus detained, had committed, or were about to commit, any wrongdoing; and

2) violation of the Fourteenth Amendment's Equal Protection Clause and Due Process Clause insofar as the municipality and its Chief of Police (Respondent Iannone), Police Captain in charge of field operations (Respondent Curtis), the then Mayor (Respondent Alexander) and City Council member (Respondent Reynolds) had consciously condoned (despite actual notification of citizen complaints sent to Respondents individually) the police custom and practice of a) stopping young, black males from traversing the municipality's environs, without any "reasonable suspicion" of wrongdoing, on the basis of race and gender and b) sham investigations of the complaints of such practices, resulting in, almost uniformly, police conclusions of "Not Sustained" or "Unfounded".

Notably, not a single arrest ever ensued, nor any citation -- save one -- for a burnt-out brake light -- ever issued, in connection with any of the initial twenty-seven stops (alleged by the original complaint) during an approximate period of twenty four months.

Among the initial twenty-seven stops alleged in the original complaint was the stop of Petitioner Earthly on January 7, 1994, at mid-day, in a parking structure within the municipality, at gun-point, by Lts. Griffey and Smith, while Mr.

Earthly was en-route to a doctor's appointment. The officers had purportedly stopped Mr. Earthly for weaving in and out of traffic. Mr. Earthly was exiting from his parked vehicle, when Lt. Griffey, gun in hand, approached Mr. Earthly with the salutation, "Put up your hands, dickhead. If you move, I'll shoot you dead." [ER-12.] [1] No citation was issued. During the stop, Lt. Griffey had repeatedly questioned Mr. Earthly whether he had ever been arrested, and upon receiving repeated, truthful denials, Lt. Griffey left Mr. Earthly with the admonition: "We'll let you go this time. Watch how you drive in Beverly Hills." [ER-13.]

The original complaint further alleged that the Beverly Hills Police Department's custom and practice of stopping young, black males, without "reasonable suspicion," arose from the police department's abiding conviction that the majority of crimes committed within the municipality had been committed by black males between the ages of 18 to 35 years. This conviction, Petitioners contended, had provided the underpinning for the custom and practice of the illegal stops and sham investigations thereof by municipality's police department: i.e., as expressly articulated by the duly appointed investigator assigned to investigate Petitioner Lafayette's filed complaint -- Lt. Munoz-Flores -- to Mr. Lafayette and his grandmother, Audrey Bowen, "in Beverly Hills, *if you are walking at night and you are black,* you are suspicious, and you are therefore more likely [than not] to be stopped." [ER-43.]

The original complaint was thereafter amended to add two additional plaintiffs, Richard Hill and Andrea Hill,

---

1 References to the excerpts of the record on appeal submitted by the parties on appeal to the United States Court of Appeals for the Ninth Circuit are denominated ER, followed by the pertinent sequential page number(s). References to the Reporter's Transcript are denominated RT followed by the pertinent page numbers.

respectively. On July 29, 1994, at 12:50 p.m., Richard Hill had driven into the municipality to have luncheon with his wife, Andrea Hill, who worked in a physician's office located within said city, when he was stopped at gunpoint by three officers in the subterranean parking garage of his wife's place of employment. During the subsequent "pat-down" by police, Mr. Hill contends that one of the officers pulled or yanked his penis and scrotum, leaving Mr. Hill in a state of great pain and consternation. Having determined that Petitioner Hill was guilty of no infraction, the officer, Max Morgan, who effected the "pat-down", subsequently extended his hand to Mr. Hill by way of apology. Mr. Hill declined the gesture and the proffered apology. This episode has subsequently affected conjugal relations between the Hills and rendered Mr. Hill subject to intermittent bouts of depression and severe anger.

On the day of the above-cited police "pat-down", July 29, 1994, Richard and Andrea Hill had proceeded to file a complaint with the Beverly Hills Police Department. On December 21, 1994, the Hills subsequently received the formal response of the municipality's police department, signed by Respondent Curtis: the department had "concluded that there was no apparent misconduct" on the part of the officer [conducting the pat-down] and that the Hills' complaint was therefore deemed to be "unfounded." [ER-77]. As a result of this response to their complaint filed with the police department, Richard Hill and Andrea Hill sought redress in federal court concerning the sham investigation they believe was accorded their complaint by the Beverly Hills Police Department.

B. Summary Judgment Proceedings and the Factual Dispute Regarding the Participation of the City Manager and City Council in the Respective Earthly Investigations.

Respondents brought -- prior to any discovery being

effectively undertaken -- a motion for summary judgment on the basis of qualified immunity. Two, significant sets of facts and contentions were revealed, pursuant to this motion for summary judgment, surrounding the first and second investigations of two of Petitioner Earthly's stops.

The first, complained-of Earthly stop (described *supra*) of January 7, 1994, had triggered a complaint by the Rev. Dr. Carol Anderson, Rector, All Saints' Episcopal Church (located in the geographic center of the muncipality), and Jean Williamson, Parish Administrator thereof, concerning the treatment of Petitioner Earthly by the municipality's police department in the unreasonable stop of their employee. Rev. Dr. Anderson and Ms. Williamson subsequently met with the municipality's City Manager, Mark Scott, to discuss the grounds of their complaint. In sworn declarations subsequently submitted at summary judgment, Ms. Anderson and Ms. Williamson stated that Mr. Scott had confided to them:

> "a) The stops [of Petitioner Earthly] are flat-out wrong;
> b) [Petitioner] Earthly is a very credible person;
> c) The Beverly Hills Police Department is a state within a state over which I [City Manager Scott] have no control; [and]
> d) Lieut. Griffey, who was responsible for the January 7, 1994 stop, was nearing retirement and therefore there was not much [he] Mr. Scott could do about it."

[ER-602; ER-693].

At summary judgment, Mr. Scott, however, had also submitted a declaration, in support of Respondents, in which he claimed, *inter alia*, (i) that the Chief of Police reported directly to him, as City Manager, under the provision (Sec. 2-3.201) of

City's Municipal Code [ER-241] [2]; (ii) that he [Mr. Scott] had been directed to further investigate the first, complained-of stop of Earthly by Respondents Alexander and Reynolds [ER-246; ER-196; ER-270]; (iii) that he had interviewed both the Police Chief [Respondent Iannone] and Lt. Joseph Lombardi (chief investigating officer, who had also reported (in addition to Mr. Scott) that he [Lombardi] had found Petitioner Earthly to be "very credible" [ER-245; ER-87]); and (iv) pursuant to his investigation, City Manager Scott had gone on "two lengthy ride-alongs" with Respondent Captain Curtis [ER-246]. City Manager Scott therefore concluded, as a result of his first "Earthly" investigation, that no practice or custom of illegal stops existed on the part of the municipality's police force.

Almost one year later, City Manager Scott was *again deputed* by Respondents Alexander and Reynolds to investigate a second, complained-of stop of Petitioner Earthly that took place on Sunday morning, May 14, 1995, as Mr. Earthly drove his vehicle into All Saints' Episcopal Church 's parking lot, pursuant to his duties as the church sexton. Mr. Earthly was, on this occasion -- the *only* occasion -- issued a citation for a "burnt-out brake light," but not before he was told by the officer in question, during the stop, to "get down" [on the ground] in front of church employees and congregants arriving for services that morning. When Petitioner Earthly refused to do so, he was told by the officer that other police would be called and that the police "will make you do whatever we want." [ER-16.]

Pursuant to this second, Earthly stop, at least eight church members sent letters to Respondents Reynolds, Alexander, Iannone and City Manager Scott protesting the

---

2 This contention of Mr. Scott's was submitted, at summary judgment, along with his reported confidence to Rev. Dr. Anderson and Jean Williamson that his own police department was a "state within a state" over which he had "no control."

treatment again accorded Petitioner Earthly [ER-16-19], pursuant to this stop. Again, City Manager Scott was deputed to conduct a further investigation. The results of the second investigation mirrored those of the prior investigation. City Manager Scott, on the basis of his conversations with certain witnesses, "ride-alongs" with Respondent Captain Curtis, and conversations with Police Chief, Respondent Iannone, was reassured as to the police conclusion that no wrong doing had occurred [ER-249].

C. Rationale of the District Court's Decision.

Following two separate days of hearings on summary judgment, the U. S. District Court (C. D. Cal.) entered its order on April 2, 1996, *denying* Respondents Iannone (Police Chief) and Curtis (Police Captain) a grant of qualified immunity and *granting* qualified immunity to Respondents Alexander and Reynolds. (App. C).

In denying, at summary judgment, a grant of qualified immunity to Respondents Iannone (Police Chief) and Curtis (Police Captain/Field Operations) of the subject municipality, the district court articulated its reasoning for its denial of qualified immunity [App. D]:

1) With respect to Respondents Curtis and Iannone, the district court stated, *inter alia*, that

> "We are dealing here with circumstantial and direct evidence. The plaintiff's [sic] argument is that although they [Curtis and Iannone] went through the [Earthly] investigation, they [Curtis and Iannone] were just going through the motions and it was basically perfunctory and symbolic, rather than actual." [RT-74; ER-848];

2) The district court further elaborated upon its

evaluation of the *factual context of the subject* Earthly investigation [RT-74; ER-848]: "the context is suggestive directly and circumstantially of a number of concerns which bely the professed objectivity. The circumstances are as follows:"

> a) "Enumerable similar complaints, all leveled by blacks under somewhat similar circumstances over a considerable period of time; namely, a year and a half or more." [RT-74; ER-848];
>
> b) City Manager Scott's statement,[3] as an admissible, non-hearsay admission by a party opponent [according to the district court], "to the effect that [Petitioner] Earthly was credible, and that the police are a state within a state over which I [City Manager Scott]--or [rather] he [City Manager Scott] had no control." [RT-75; ER-849];
>
> c) The "input from the community, to include the people of All Saints' Church, which in effect vouched, at least, for [Petitioner] Earthly and others." [RT-75; ER-849]; and

---

3 The Petitioners had contended at summary judgment, and thereafter on appeal, that the *sham* character of the respective Earthly investigations, and the *personal participation* of Respondents herein in the tacit custom and practice of condoning the stops, were *necessarily* made *genuine issues of material fact*, when, according to the *respective* declarations of Rev. Dr. Carol Anderson, and Parish Administrator, Jean Williamson, the chief municipal administrator -- and *chief, duly appointed investigator* -- Mr. Mark Scott, had stated to these third party, witnesses that: a) "The stops [of Petitioner Earthly] are flat out wrong; b) [Petitioner] Pat Earthly is a very credible person; c) The Beverly Hills Police Department is a state within a state over which I [Mark Scott] have no control; [and] d) Lieut. Griffey, who was responsible for the January 7, 1994 stop, was nearing retirement and therefore there was not much [he] Mr. Scott could do about it." [ER-602; ER-693].

d) The statement[4] of Lt. Munoz-Flores, the designated superior officer of the Beverly Hills Police Department, charged with the police departmental responsibility of communicating with Petitioner Lafayette, and his grandmother, Audrey Bowen (who had previously filed a complaint on behalf of her grandson, Petitioner Lafayette): "You also have an allegation that an officer said, basically, 'A black on the street was going to be treated differently in Beverly Hills.' " [RT-75-76; ER-849-850].

On October 10, 1997, the Ninth Circuit panel filed its decision[App. A] (*reversing* the decision of the district court, which had denied qualified immunity as to Respondents Iannone and Curtis, and *affirming* the district court's decision *granting* qualified immunity as to Respondents Alexander and Reynolds), and on December 1, 1997, the Ninth Circuit Court of Appeals filed its order rejecting Petitioners' petition for rehearing and their suggestion for rehearing *en banc*. [App. B].

II. The Ninth Circuit's Asserted Ground For Exercising Jurisdiction In This Case Forms The Basis For The Questions Presented To This Court.

The Ninth Circuit Court of Appeals' panel elected to exercise jurisdiction over the interlocutory appeal of Respondents Iannone (Police Chief) and Curtis (Police Captain/Field Operations) on the basis that:

---

4 In a meeting with Mrs. Audrey Bowen, and her grandson, Petitioner Lafayette, the designated, departmental officer, Lt. Munoz-Flores, articulated to Mrs. Bowen the express, if unacknowledged and unwritten, policy or custom of the subject municipality: ". . . in Beverly Hills, *if you are walking at night and you are black*, you are suspicious, and you are therefore more likely [than not] to be stopped." [ER-43; ER-683-684].

> "A denial of qualified immunity on summary judgment is immediately appealable if the issue presented concerns an 'abstract issue of law.' *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996). Here, the defendants' appeal is based on an issue that we may properly consider: whether all of the evidence that the district court deemed sufficiently supported for purposes of summary judgment meets a standard of 'objective legal reasonableness'. "

[citing *P.B. v. Koch*, 96 F. 3d 1298, 1301 (9th Cir. 1996)]. *Memorandum Opinion*, (*see* App. A, at A 6, *infra.*)

The Ninth Circuit's above-stated ground for exercising jurisdiction in the present case forms the basic grounds for *both questions* presented to this Court for consideration: namely,

1) whether the test of "objective legal reasonableness", applied to a defense of qualified immunity, under the *Harlow v. Fitzgerald* [457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed 2d 396 (1982)] standard, as refined by the Court's opinion in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), *should be properly applied to*, or *can effectively address*, or *can conclusively resolve*, at summary judgment, those intent-specific, underlying constitutional torts involving racial bias[5] (as alleged in the present case), or other unlawful intent, such as retaliatory motive[6], or forbidden motive, particularly within the

---

5 *See, e.g., Tang v. State of R.I. Dep't of Elderly Affairs*, 120 F. 3d 325, 327 (1st Cir. 1997) ("We think that the *Harlow-Anderson* objective test does not automatically resolve a qualified immunity defense in favor of the defendant in a case of alleged racial discrimination of retaliation.").

6 This Court has recently granted certiorari to the United States Court of Appeals for the D.C. Circuit in *Crawford-El v. Britton*, 93 F. 3d 813, 817 (D.C. Cir. 1996) (en banc), *cert. granted*, 66 U.S. L.W. 3031 (U.S. July 15, 1997) (No. 96-827).

context of substantive due process claims. [7]

2) the exercise of appellate jurisdiction over an interlocutory appeal on the basis of qualified immunity characteristically has presupposed that the *Harlow-Anderson* standard of "objective legal reasonableness" can satisfy, under the "collateral order" doctrine, two specific criteria:

> "An appealable interlocutory decision must satisfy two additional criteria: it must 'conclusively determine the disputed question,' [citation omitted], and that question must involve a 'clai[m] of right separable from, and collateral to, rights asserted in the action' [citation omitted]."

Mitchell v. Forsyth, 472 U.S. 511, 527, 105 S. Ct. 2806, 2816, 86 L. Ed 2d 411 (1985). Where, however, the conduct of governmental officials would appear unexceptionable *were it not for* the triable issue of fact (as deemed by a district court) that such officials may have taken such actions (or, alternatively, may have failed to have taken such actions) with a proscribed intent (whether racial or retaliatory or otherwise forbidden in character), the question arises whether *exclusive reliance* by an appellate court upon the formulae, embodied by, or within, the *Harlow-Anderson* standard of "objective legal reasonableness", may serve as a sufficient basis to grant an interlocutory appeal for purposes of appellate jurisdiction.

The latter question is not a mere hypothetical nicety. In the present case, the Ninth Circuit's opinion focused

---

7 *See, e.g., Grant v. City of Pittsburg*, 98 F. 3d 116, 124 and f. n. 4 (3d Cir. 1996) ("despite the broad language of *Harlow*, courts are not barred from examining evidence of a defendant's state of mind in considering whether a plaintiff has adduced sufficient evidence to withstand summary judgment on the issue of qualified immunity, where such state of mind is an essential element of the constitutional violation itself.").

preeminently upon the second prong of the *Harlow* inquiry: the " 'objective legal reasonableness' of the official's conduct" [*Memorandum Opinion* (App. A at A 5)]: "[t]hus, the issue we are asked to resolve concerns the second step of the [*Harlow*] qualified immunity analysis." *Memorandum Opinion* (App. A at A 5).

As identified above, the present Ninth Circuit panel decision would appear to have been decided under the legal *presupposition* that intent-specific, constitutional torts lend themselves, as readily as any other governmental official's individual infraction, to the impress of the test of "objective legal reasonableness." Hence, the Ninth Circuit panel viewed *its particular, analytic obligation* in the present case *as requring nothing more than* resolving "an abstract issue of law." *Memorandum Opinion,* App. A, at A 6.

The question, remains, then, where certain actions, or omissions, of governmental officials, which are alleged to have been taken with illicit intent, *and* said allegations have been, on summary judgment, deemed by a district court, upon *sufficient* evidence submitted at summary judgment, to constitute triable, material issues of fact, does the analysis for qualified immunity rest, therefore, *exclusively*, upon an *objective* determination of the *outward* conduct of governmental officials, *stripped* of individual intent?

The Ninth Circuit panel's decision in the present case was content to ignore, evidently, the existence of individual intent in its evaluation of the "objective legal reasonableness" of the subject conduct of the Respondents:

> "The second inquiry focuses on the 'objective legal reasonableness of the official's conduct, as measured by reference to clearly established law.' *Harlow v. Fitzgerald*, 457 U.S. 800, 818,

(1982). In this respect, the issue regarding the 'objective legal reasonableness' of the official's conduct coincides in large part with the substantive issue of whether the official's action or inaction constitutes deliberate indifference."

Memorandum Opinion, App. A at A 5.

When, however, Petitioners have asserted a primary claim of *sham investigations* of illegal, police stops, *and* the district court has thereafter deemed that sufficient evidence existed to hold, for jury determination, the respective conduct of Respondents Iannone and Curtis, as triable issues of material fact as to whether these Respondents had been "deliberately indifferent," the question thus arises whether the Ninth Circuit panel's decision was demonstrably incorrect insofar as it signally omitted any consideration of, or reference to, the concept of illicit intent in a case charging sham investigations.[8]

The Ninth Circuit's analysis, in excluding any reference to intent, would appear *notably anomalous*, given the fact that the court recognized that it was considering conduct alleged to have been *deliberately indifferent. See Memorandum Opinion*, App. A at A 4.

---

8 The omission of any reference to illicit intent is worthy of particular note. The case of *Grant v. City of Pittsburg*, cited *supra*, was, expressly, brought to the attention of the appellate panel on oral argument, regarding, specifically, the issue of illicit intent and the test of "objective legal reasonableness." The Ninth Circuit panel was, expressly, further informed that "this is a hot issue among the circuits."

III. The Ninth Circuit Panel Elected To Exclude From Its Consideration Of The Interlocutory Appeal and Cross-Appeal Petitioners' Claims Of Due Process Of Law.

Within its *Memorandum Opinion* (App. A, at A 4 f. n. 1, the Ninth Circuit Court panel had elected, evidently, to *exclude from its consideration* of the interlocutory appeal of Respondents Iannone and Curtis *and* the subsequent cross-appeal of Petitioners, two issues -- the first one *compelling* in nature, the other not, upon which Petitioners had grounded their *primary* claims under 42 U.S.C. Section 1983:

> 1) violations of the Fourteenth Amendment's protection of *procedural* due process of law in connection with the sham investigations; and
>
> 2) violations of *substantive* due process of law under the Fourteenth Amendment pertaining to an "historic liberty interest" of Petitioners in their bodily integrity under said clause.

The first exclusion by the Ninth Circuit panel from consideration of the interlocutory appeal and cross-appeal is *critical* to Petitioners' case; the second exclusion is concededly dispensable. (*See Albright v. Oliver*,___U.S.___, 114 S. Ct. 807, 813, 127 L. Ed. 2d. 114 (1994)). The summary -- and Petitioners contend, erroneous -- dispatch by the Ninth Circuit panel, however, of a claim of violation of *procedural due process of law*--when Petitioners' suit has been *premised* upon *sham investigations* of illegal police stops -- forms a central aspect of this Petition.

The Ninth Circuit elaborated upon its rationale for the exclusion of Petitioners' *procedural* due process claim when the appellate panel stated that Petitioners' claim of violation of

procedural due process of law *and* Petitioners' concomitant theory of Respondents' *personal participation* in the *sham* investigations had neither been *argued* nor *raised* before the district court:

> "Similarly, the plaintiffs attempt to transform their case from one grounded on a supervisor's failure to act, to one that is based, at least in part, on a supervisor's direct participation in the illegal conduct. These legal theories, however, were not asserted in the plaintiffs' complaint and were not argued before the district court."

Memorandum Opinion (App. A, at A 4 f. n. 1).

The Ninth Circuit panel's parenthetical commentary, set forth within the above-cited footnote, would appear to disclose the following conclusions and implications:

1) The Ninth Circuit court had, apparently, *concluded*, within the above-cited footnote, that Petitioners had failed to set forth, *in their complaint*, and *subsequently, had failed to argue, in written motion* and/or on *oral argument, before the district court*, their *legal theories* of (a) *sham investigations* of the illegal stops (i.e., outwardly acceptable, objective conduct infected by illicit motive) and (b) violations of *procedural due process* of law, under the Fourteenth Amendment, *as a result thereof.*[9]

---

9 Whether the underlying record demonstrates that Petitioners had sufficiently raised and litigated in the district court the issue of "procedural due process of law" , and had asserted, and provided sufficient evidence of, the issue of Respondents' *personal participation* in the alleged sham investigations before the district court, will be addressed in Petitioners' *Reasons for Granting the Writ.*

The Ninth Circuit panel had, therefore, declined to consider the legal proposition that a governmental official's alleged series of protracted failures to preclude continuing violations (of both the underlying stops by police field officers and the sham investigations thereof) may also *include* the distinct, yet closely related, concept that said official's *same protracted failures* to curtail the proscribed stops may well implicate that same official, *as a personal participant*, in the tacit custom and practice of sham investigations themselves.

2) The Ninth Circuit court's above-cited footnote (*Memorandum Opinion*, App. A at A 4, f. n.1) neither evinces, nor gives any indication of, what other circuit courts have expressly noted: that when governmental officials act, or fail to act, or both, with a proscribed intent, those actions or omissions, which otherwise may have been, or would have been, ostensibly legal -- based upon an "objective legal reasonableness" test -- become necessarily illegal because, in the words of one court, " 'reasonably competent official[s],' " who act with certain improper motives, " *'should know* the law [proscribes their] conduct.' " *Grant v. City of Pittsburgh*, 98 F. 3d at 125 (quoting *Harlow*, 457 U.S. at 819).

This Petition presents these important questions.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Ninth Circuit Panel Conflicts With Other Sister Circuit Decisions and The Ninth Circuit's Own Interpretation of Qualified Immunity and the Scope of Appellate Jurisdiction on Interlocutory Appeal.

This case raises the fundamental issue that has continued to confound the various circuit courts of appeal on the issue of "qualified immunity": namely, where an underlying,

constitutional tort claim has been alleged, and the claim necessarily involves an intent-specific element as a constituent part of its cause of action, can the test of "objective legal reasonableness" be properly applied? The purpose of the *Harlow-Anderson* formulation was to provide, *inter alia*, governmental officials, and aggrieved plaintiffs alike, with a *reliable, predictive* and *conclusive* criterion by which to determine the reasonableness of an individual, governmental official's conduct. The formulation has failed of its intended purpose.[10]

Various circuit courts have gamely struggled with this test, urging, with uneven results, stubborn congruence upon the disparate facts and circumstances of the case before them, in an effort to fit such facts and circumstances within the so-called

---

10 *See, e.g., Tang v. State of R.I. Dep't of Elderly Affairs*, 120 F. 3d 325, 327 (1st Cir. 1997) ("In all events, the circuit courts have almost uniformly refused to apply a strictly objective test of qualified immunity in racial and retaliatory cases"); *Crawford-El v. Britton*, 93 F. 3d 813, 817 (D.C. Cir. 1996) (*en banc*), *cert. granted*, 66 U.S.L.W. 3031 (U.S. July 15, 1997) (No. 96-827) ("In fact, under the decisions of every circuit court addressing the matter, *Harlow* has not accomplished the stated purpose. This circuit and others have understood *Harlow* to allow inquiry into subjective motivation where an otherwise constitutional act becomes unconstitutional only when performed with some sort of forbidden motive . . . ."); *Grant v. City of Pittsburgh*, 98 F. 3d 116, 125 (3rd Cir. 1996) ("We therefore join our sister circuits in adopting the narrower view of *Harlow*. Accordingly, in evaluating a defense of qualified immunity, an inquiry into the defendant's state of mind is proper where such state of mind is an essential element of the underlying civil rights claim."); *accord, Chateaubriand v. Gaspard*, 97 F. 3d 1218, 1223 (9th Cir. 1996) ("Under *Johnson [v. Jones*, ___U.S.___, 115 S. Ct. 2151, 132 L. Ed 2d 238 (1995)], we have no jurisdiction over 'questions about whether or not a record demonstrates a "genuine" issue of fact for trial' [citing *Johnson*, 115 S. Ct. at 2158]. That includes 'factual controversies about, for example, intent.' *Id.*").

objective criteria of the test.[11] Other circuit courts have taken comfort in the belief that the test of *objective legal reasonableness* has conveniently relieved them of the burden of weighing the imponderable quantity of illicit intent, and therefore, such courts willingly impose the test, secure in the conviction that the test, whatever its perceived defects, is admirably efficient, particularly when applied to official conduct ostensibly devoid of discernible motive.[12]

---

11 *See, e.g., Tang*, 120 F. 3d at 327 ("In a few circuits, it appears that courts have responded by squeezing *Johnson* [*v. Jones*, cited *supra*] a bit and effectively granting interlocutory review of denials of qualified immunity based on alleged factual disputes about intent; but this circuit and a number of others have resisted that course [f. n. omitted]"); *Auriemma v. Rice*, 910 F. 2d 1449, 1455; 1456 (7th Cir. 1990) (*en banc*), *cert. denied*, 501 U.S. 1024, 111 S. Ct. 2796, 115 L. Ed. 2d 970 (1991) ("We are urged by [appellant] Rice to eliminate his subjective intent, whatever in fact it was, from the qualified immunity analysis . . . ,"[but the court has, previously, in the opinion, declined to do the same:] "[i]t is agreed that intent is crucial to a plaintiff's claim but relevant only in determining whether a constitutional violation exists . . . "); *Sloman v. Tadlock*, 21 F. 3d 1462, 1468 f. n. 7 (9th Cir. 1994) ("This [issue of defendant's motives] distinguishes the present case from excessive force cases, for instance, where the defendant's conduct is evaluated under an objective 'reasonableness' standard. *See Branch v. Tunnell*, 937 F. 2d 1382, 1385-86 (9th Cir. 1991) (discussing tension between objective focus of immunity inquiry and necessity of examining defendant's subjective intent when it is an element of the alleged constitutional tort; adopting heightened pleading standards for such cases)").

12 Of particular interest in this regard is the *present* Ninth Circuit panel decision, where the Ninth Circuit panel elected to cite, an "excessive force" case to support its invocation of the "objective legal reasonableness" test. *See P.B. V. Koch*, 96 F. 3d 1298, 1299-1301 (9th Cir. 1996) cited within *Memorandum Opinion*, App. A at A 6. This application of the test of "objective legal reasonableness," by the Ninth Circuit panel, citing, without describing the context of, a case strictly dealing with the outward conduct evidenced *by a high school principal* toward a student in his charge, illustrates the precedential latitude to which the test has been put. The *Koch* case does not allude, in any respect, to illicit intent. What the *Koch*

The subject decision of the Ninth Circuit panel would seem to run, as well, afoul of the Ninth Circuit Court of Appeals' own *circuit* approach to *factual disputes* regarding the issue of alleged illicit intent. For example, in *Armendariz v. Penman*, 75 F. 3d 1311, 1316-1317 (9th Cir. 1996) (*en banc*), the Ninth Circuit underscored two important principles about interlocutory appeals:

> 1) issues relating to whether the pretrial record demonstrates genuine issues of material fact cannot be entertained on interlocutory appeal *"because such fact-based inquiries are not within the scope of an interlocutory appeal from the denial of qualified immunity"* (75 F. 3d at 1316) (emphasis added); and
>
> 2) "an appellate court lacks jurisdiction in an interlocutory appeal to consider the question whether the plaintiff has created a genuine issue of fact regarding whether particular defendants *participated personally* in the alleged wrongful conduct."

[citing *Johnson v. Jones*, ___U.S.___, 115 S. Ct. at 2156-59] (emphasis added) (75 F. 3d at 1317).

The Ninth Circuit's *en banc* approach in *Armendariz* to material, factual disputes regarding illicit intent reveals an implicit recognition that the *conclusive determination* (required by the "collateral order" doctrine) as to whether an official did or did not participate personally in alleged wrongdoing (e.g., sham investigations (present Petition case) or sham building-inspection sweeps (*Armendariz*)) will often depend upon an

---

case does present is a perfect example of precedent *inappropriately invoked. See Memorandum Opinion*, App. A at A 6.

extensive factual inquiry into the context surrounding the allegation of illicit intent, i.e., whether the investigation or inspection was *pretextual* in character. *Armendariz*, 75 F. 3d at 1327. Such an inquiry, of course, falls outside the scope of appellate jurisdiction on interlocutory appeal. *See, e.g., Chateaubriand v. Gaspard*, 97 F. 3d 1218, 1223 (9th Cir. 1996) ("We have no jurisdiction to review factual issues in this context [retaliatory intent].").

Accordingly, the disputed factual issue of *personal participation* by governmental officials in alleged wrongdoing will often invite an inquiry by an appellate court into the factual context of the allegations claiming illicit intent and pretextual conduct. That inquiry, however, is proscribed (under *Johnson v. Jones*,___U.S.___,115 S. Ct. at 2156-59; *Armendariz*, 75 F. 3d at 1317, 1327-1328), and hence, an appellate court may not exercise jurisdiction over such an interlocutory appeal.

The above discussion illustrates *why* there exists (in cases pertaining to allegations of sham investigations or other governmental proceedings colored by charges of pretextuality) a close -- and at times, inextricable -- *nexus* between the *Harlow objective* assessment of outwardly acceptable governmental conduct (allegedly infected with illicit motive) and the factually laden inquiry as to whether an individual, governmental defendant *participated personally* in the alleged wrongdoing. In both cases, the same *conduct* must be scrutinized. In each case, the factual inquiry necessitated thereby places such issues beyond the jurisdictional ken of an appellate panel upon interlocutory appeal. The present Ninth Circuit panel could not, or would not, recognize in its decision these palpable conclusions.

II. This Petition Presents An Important Question As To The Viability of the *Harlow-Anderson* Test of *Objective Legal Reasonableness.*

It has become apparent to federal appellate courts in numerous circuits that the broad language of *Harlow* has not been applied with any particular rigor to cases involving racial bias, retaliatory intent or other forbidden motive.[13] Indeed, the issue should be stated rather more forcefully and more accurately: that numerous circuit courts have perceived -- all too clearly -- that the broad language of *Harlow* will not be applied -- *in futuro* -- to such categories of cases, in the absence of this Court's most careful reconsideration of these three categories of cases in light of the *Harlow-Anderson* formulation. This is the clear inference derived from those circuits that have endeavored, with deftness and scholarship, to sift the difficulties inherent within underlying, intent-specific, constitutional torts.[14]

The entire *raison d'etre* for the *Harlow-Anderson* standard was its proposed utility in serving as a legal compass to guide the lower courts in navigating the treacherous waters that often separate the affairs of governance (and governmental

---

13 *See, e.g.*,footnotes 5, 6, 7, 10 and 11, respectively, cited *supra.*

14 It may be that, in any future reconsideration by the Court of the *Harlow-Anderson* standard, for the Court to insist on a simple, stalwart affirmation of the standard, in defense of precedent, is to risk the consequence endured by Canute, King of England, who bade the rising tide to go no further, thus shaming his flattering courtiers, when the sea wetted his regal garments. The precedential standard has been too plainly disregarded by too many federal circuits for the Court to propose a minor tinkering with the test of *objective legal reasonableness.* It is again noted that the Court has granted certiorari in the case of *Crawford-El v. Britton* (*see* f. n. 6, *supra)*, which case raises many of the same fractious issues set forth within this present Petition.

officials) from the perhaps more parochial, if no less substantive, concerns of the citizens whom such officials have pledged to serve. As previously indicated, many circuit courts have diverted course from the charted passage contemplated by the *Harlow-Anderson* formulation in cases of racial bias, retaliatory motive or other forbidden intent.[15] The legal compass, it would appear, is in need of re-calibration.

The test of *objective legal reasonableness* cannot fulfill its intended purpose, if it is to be applied reflexively, without regard to the interior motives of the men and women who are sworn to uphold the law. That is the simple thrust of this Petition. Humane governance requires reckoning with individual intent, whether laudable or lamentable in its character. For this test to apply, simply to the outward semblance of proper conduct, is to subordinate the search for truth to the demands of mere state-craft efficiency. To accept the test in the guise of such superficial application " 'would insulate officials from liability in all cases in which the substantive prescription makes the official's state of mind an essential component of the alleged constitutional violation.' " *Broderick v. Roache*, 996 F. 2d 1294, 1298 (1st Cir. 1993) (quoting *Martin v. District of Columbia Metro. Police Dept.*, 812 F. 2d 1425, 1433 (D. C. Cir.), *en banc order vacated and Section IV and dissenting opinion reinstated*, 824 F. 2d 1240 (D. C. Cir. 1987)).

III. The Ninth Circuit Panel's Conclusion That Petitioners *Had Waived* Their Central Claims of Due Process Violations Is *In Clear Defiance* Of The *Established* Facts Of The Underlying Record.

The Ninth Circuit panel, in almost baffling defiance of

---

15 *See, supra*, f. n. 5, 6, 7, 10 and 11, respectively, cited *supra*.

the *printed, underlying record*, declared, *with no factual authority therefor*, that Petitioners had raised, *only at the appellate stage*, and thus, *thereby, had waived*, their *separate* due process claims of *violations of procedural due process* (sham investigations) and of *substantive due process* (violations of an "historic liberty interest" in bodily integrity). *Memorandum Opinion*, App. A at A 4, f. n. 1. The Panel further maintained, in the same paragraph, that

> "plaintiffs attempt to *transform* their case from one grounded on a supervisor's failure to act, to one that is based, at least in part, on a supervisor's *direct participation in the illegal conduct*. These legal theories, however, were not asserted in the plaintiffs' complaint and were not argued before the district court."

Id. (emphasis added).

The above *conclusions* and *determinations* by the Ninth Circuit panel are *emphatically belied* by the most casual reading of the *underlying record*. Let us address them, *seriatim*. First, (1) the *First Amended Complaint* had averred, expressly, the existence of sham investigations that conduced necessarily to sham, exonerating conclusions. *See, e.g.*, paragraphs 243, 245, 254 and 257, respectively, of the same regarding the *direct participation* of defendants-appellants Iannone and Curtis in the *sham investigations* and *sham conclusions* re: the investigation of Richard and Andrea Hill's complaint. [ER-77 through ER-82 *passim*]; (2) *see also* the articulation of the custom and practice of illegal stops as set forth *by the investigating officer*, Lt. Munoz-Flores [ER-42-44; 334-335; 440-442; (cf. also *paras.* 128-132 of the *First Amended Complaint)* [ER-42-44]] to Audrey Bowen and Jerry Lafayette regarding the twelve (12) stops of Petitioner Lafayette; (3) *see also* the *eight* (8) letters of protest (appended to the *First Amended Complaint)* [ER-88-97, *passim*] regarding the four (4) stops and initial investigation

of the first Earthly complaint; and, finally, (4) *see also* the letter of Rev. Dr. Carol Anderson to Mark Scott, dated May 3, 1994, registering her incredulity at the BHPD's finding of "Not Sustained" [ER-604].

On summary judgment before the district court, Petitioners' written and duly filed *Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment (Memorandum)* had stated, expressly, its *four* (4) basic grounds underlying their claims set forth in the *First Amended Complaint* on *page one (1) thereof.* [16] Procedural and substantive due process claims cannot be set forth more emphatically. *See also*, in particular, pages 16-21, *passim*, of said *Memorandum*, where all defendants are *timely* confronted with procedural arguments regarding the *suspect "objective" validity* of the purported investigations.

Equally, significantly, Petitioners had stated *procedural and substantive due process violations* (and of all defendants' *direct participation* within the same) at oral argument, on summary judgment, over two (2) separate days (March 25, 1996 and April 2, 1996, respectively). Petitioners now adduce a few excerpts (out of a manifold number) that will *illustrate the*

---

16 "The gravamen of the instant action filed by plaintiffs Earthly, Lafayette, Kenyatta, Brandon Nash, Brent Nash, Jones, Richard Hill and Andrea Hill, respectively (*Plaintiffs*), pertains to four (4) discrete, but interrelated, claims: (i) illegal stops, in contravention of the Fourth Amendment to the U.S. Constitution; (ii) violation of Fourteenth Amendment [to the U.S. Constitution]'s guarantee of equal protection; (iii) violation of the *Due Process* clause's securance of an *historic liberty interest* protected *substantively* by said clause; and (iv) violation of the *Due Process* clause's guarantee of *procedural* due process by virtue of defendants' provision of an illusory procedural mechanism by which remedy and redress are ostensibly afforded to aggrieved parties, but the avenues of petition prove only to be improvident streets, where denial and disservice stand as the only sign-posts." *Id.*

fact that (i) violations of *procedural and substantive due process* were *constantly emphasized* during *oral argument* on summary judgment, and (ii) *direct participation of all defendants in the sham investigations* was, at summary judgment, *underscored*:

> a) "So this is a case of *direct involvement*, having *nothing to do* with *respondeat superior*, and that *direct involvement damns them* [the Respondents], because they didn't ask a simple question." [RT-11; ER-739] (emphasis added) [Petitioners' argument to District Court];
>
> b) "He [counsel for Petitioners] makes the same argument that, 'Hey, you may have gone out [and done your investigation], but it's a *sham*, and that's a *question of fact*, whether you were for real or not for real, and Judge, you can't be making that kind of determination in this setting.' " [RT-23; ER-751] [District Court to Counsel for Respondents] (emphasis added);
>
> c) "The defendants *knew* that the complainant [Earthly] was *very credible*. They had *a duty* to conduct *a heightened inquiry* to investigate the matter. That's a *factual question*, and that's why we're here. That's why we argued the Fourth and Fourteenth Amendment, the *procedural denial of due process*, as well as the *substantive denial*." [RT-44; ER-772] [Petitioners' argument to the District Court] (emphasis added); and
>
> d) "And it's my view that you can't just look at what the investigation was and say, 'Judge, because the investigation was undertaken in

facially objective way, the defendant officers have not been deliberately indifferent.'

That begs the question, the question being what's the *context* within which they [the Respondents] undertook this [investigation], according to the plaintiff[s]? I described the context, and *that calls into context the credibility* [of Respondents Iannone and Curtis]. Motion *denied* as to both officers." [RT-76; ER-850] [District Court to Counsel for Respondents *and* Petitioners] (emphasis added).

CONCLUSION

This Court should grant this petition for certiorari to resolve two important and fundamental issues: first, whether the test of *objective legal reasonableness* precludes, in its proper application, consideration of illicit intent when sufficient evidence, on summary judgment, has been adduced to support allegations of governmental officials' condonation of, or participation within, sham investigations of unreasonable stops of black males within the subject municipality, and 2) whether an appellate court can exercise jurisdiction over an interlocutory appeal when a fundamental, factual dispute obtains, concerning the alleged, participation of such officials in, or their conscious condonation of, a sham series of investigations involving, necessarily, the presence of illicit intent.

DATED: February 25, 1998

Respectfully submitted,

ROBERT R. BRINA
Counsel of Record
CASE & BAKER, LLP

ROBERT K. TANENBAUM

MICHAEL W. FITZGERALD
LAW OFFICES OF
ROBERT L. CORBIN, P.C.

Attorneys for Petitioners,
PATRICK J. EARTHLY; JERRY LAFAYETTE; BRANDON NASH; BRENT NASH; MOACIR JONES; JOMO KENYATTA; RICHARD V. HILL, and ANDREA HILL.

Supreme-Ct

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 10 1997
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

PATRICK EARTHLY, an individual; AUDREY BOWEN, as Guardian ad Litem for Jerry Lafayette, a minor; YOLANDA NASH, as Guardian ad Litem for Brandon and Brent Nash, minors; CHERYL JONES, as Guardian ad Litem for Moacir Jones, a minor, RALPH JONES, as Guardian ad Litem for Moacir Jones, a minor; JAYNE SOMOGY, as Guardian ad Litem for Jomo Kenyatta, a minor; RICHARD V. HILL, an individual; ANDREA HILL, an individual,	)
Plaintiffs-Appellees-Cross-Appellants,	)
v.	)
CITY OF BEVERLY HILLS; ALLAN L. ALEXANDER, City of Beverly Hills Mayor and City Council Member, individually and in his official capacity, VICKI REYNOLDS, City of	) No. 96-55588) 96-55884) D. C. No. CV-95-07938-WDK

Beverly Hills City Council Member, individually and in her official capacity,	)	
Defendants-Cross-Appellees,	)	
and	)	MEMORANDUM*
MARVIN IANNONE, City of Beverly Hills Chief of Police, individually and in his official capacity; ROBERT P. CURTIS, individually and in his official capacity,	)	
Defendants-Appellants.	)	

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted
August 8, 1997-Pasadena, California

Before: Hall and T.G. Nelson, Circuit Judges, and
Winmill, District Judge.*

Patrick Earthly, Jerry Lafayette, Brandon Nash, Brent Nash, Moacir Jones, Jomo Kenyatta, Richard V. Hill and Andrea Hill (collectively the "plaintiffs"), bring this 42 U.S.C. Section 1983 civil rights action against various City of Beverly Hills officials (collectively the "defendants") alleging that the defendants' failure to adequately supervise, train and investigate subordinate police officers resulted in illegal and racially motivated traffic stops. Marvin Iannone, Chief of the Beverly Hills Police Department ("BHPD"), and Beverly Hills Police Captain Robert P. Curtis (collectively the "police supervisors") appeal the district court's interlocutory order denying their motion for summary judgment based on qualified immunity. The plaintiffs, in turn, obtained certification pursuant to Federal Rule of Civil Procedure 54(b) to cross appeal the district court's decision to grant summary judgment in favor of Beverly Hills City Council members Allan Alexander and Vicki Reynolds (collectively the "council members"). We review summary judgment determinations de novo. *Act Up! / Portland v. Bagley*, 988 F. 2d 868, 871 (9th Cir. 1993). We reverse the denial of the police supervisors' motion for summary judgment and affirm the judgment in favor of the council members.

---

* The Honorable B. Lynn Winmill, District Judge of the District of Idaho, sitting by designation.

I.

Where, as here, supervisory liability is predicated on the alleged unconstitutional actions of a subordinate, the theory of liability cannot rest on *respondeat superior*. *Taylor v. List*, 880 F. 2d 1040, 1045 (9th Cir. 1989). However, an official who has failed to prevent a constitutional violation, by inadequately training, supervising or investigating his subordinates, may be liable under Section 1983 if the plaintiff shows 1) the supervisor possessed the requisite culpable state of mind, and 2) a causal connection between the supervisor's action or inaction and the infliction of the alleged constitutional harm.[1] *See, e.g., Redman v. County of San Diego*, 942 F. 2d 1435, 1446-47 (9th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1074 (1992); *Sanders v. Kennedy*, 794 F. 2d 478, 483 (9th Cir. 1986). The parties agree that culpability is established by showing a supervisor was deliberately indifferent to "acts by others which the [supervisor] knows or reasonably should know would cause others to inflict the constitutional injury." *Redman*, 942 F. 2d at 1447. When applied to determine the culpability of a supervisor who "failed to act to prevent" a constitutional injury, the deliberate indifference standard is objective in nature. *See Redman*, 942 F. 2d at 1447 (focusing on the supervisor's actions in relation to what the supervisor "knew or reasonably should have known").

---

1 On appeal, the plaintiffs also purport to ground their Section 1983 action on a violation of a "historic liberty interest" and a violation of procedural due process. Similarly, the plaintiffs attempt to transform their case from one grounded on a supervisor's failure to act, to one that is based, at least in part, on a supervisor's direct participation in the illegal conduct. These legal theories, however, were not asserted in the plaintiffs' complaint and were not argued before the district court. Accordingly, they are waived. *See Brazil v. United States Dep't of Navy*, 66 F. 3d 193, 198-99 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1317 (1996); *Royal Ins. Co. v. Sea-Land Serv. Inc.*, 50 F. 3d 723, 729 (9th Cir. 1995).

In the district court, the individual defendants based their motion for summary judgment on the protection provided by the qualified immunity doctrine. The determination of whether a law enforcement officer is entitled to qualified immunity involves a two step analysis. In the first step the court "must determine whether the law governing the official's conduct was clearly established at the time the challenged conduct occurred." *Perkins v. City of West Covina*, 113 F. 3d 1004, 1008 (9th Cir. 1997). Second, the court must consider "whether, under that clearly established law, a reasonable officer could have believed the conduct was lawful." *Id.*

The parties do not dispute that at the time of the incidents giving rise to this Section 1983 action, clearly established law proscribed traffic stops unsupported by reasonable suspicion. *See Terry v. Ohio*, 392 U.S. 1 (1968). Similarly, all parties acknowledge that a police officer could not legally stop a citizen on the basis of race. *See Gonzales v. City of Peoria*, 722 F. 2d 468, 480 (9th Cir. 1983). Lastly, the parties agree that a supervisor could not act with deliberate indifference to a plainly obvious risk of a constitutional violation. *See Sanders*, 794 F. 2d at 483. Thus, the issue we are asked to resolve concerns the second step of the qualified immunity analysis.

The second inquiry focuses on the "objective reasonableness of the official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this respect, the issue regarding the "objective legal reasonableness" of the official's conduct coincides in large part with the substantive issue of whether the official's action or inaction constitutes deliberate indifference. "A finding of deliberate indifference necessarily precludes a finding of qualified immunity; . . . officials who *deliberately* ignore [conduct that may violate the constitution] cannot claim that it was not apparent to a reasonable person that such actions violated the law." *Hamilton v. Endell*, 981 F. 2d 1062, 1066

(9th Cir. 1992) (emphasis in original); *see also P. B. v. Koch*, 96 F. 3d 1298, 1301-04 (9th Cir. 1996).

II.

A denial of qualified immunity on summary judgment is immediately appealable if the issue presented concerns an "abstract issue of law." *Behrens v. Pelletier*, 116 S. Ct. 834, 842 (1996). Here, the defendants' appeal is based on an issue that we may properly consider: whether "all of the evidence that the district court deemed sufficiently supported for purposes of summary judgment meets a standard of 'objective legal reasonableness.'" *Koch*, 96 F. 3d at 1301.

III.

The record demonstrates that council members Alexander and Reynolds were aware of only two formal complaints, both filed by Mr. Earthly. The council members also received several letters from concerned citizens complaining about the treatment of Mr. Earthly in particular and racially motivated stops in general. Finally, we assume for the purposes of this appeal that the defendants were aware of City Manager Scott's misgivings regarding the official investigation of Mr. Earthly's first stop.[2] Given this knowledge, the council members did not act with deliberate indifference to the plaintiffs' constitutional rights.

To the contrary, after Mr. Scott informed the council

---

2 Because it makes no difference to the resolution of the parties' appeals, we do not decide whether the district court abused its discretion in ruling that Mr. Scott's purported statements to Rev. Anderson were admissible under an exception to the hearsay rule.

members of Mr. Earthly's first complaint, the results of the BHPD investigation, Rev. Anderson's concerns and, presumably, Mr. Scott's misgivings, the council members directed Mr. Scott to look into the matter further. Consequently, Mr. Scott rode along in BHPD patrol cars on two separate occasions, reviewed BHPD practices with defendant Iannone and met with Mr. Earthly and Ms. Williamson. This further inquiry into Mr. Earthly's first stop led Mr. Scott to conclude that "the BHPD does not condone the making of traffic or pedestrian stops on the basis of race, and the Department is committed to the protection of civil rights."

In a similar manner, when faced with a second complaint from Mr. Earthly, the council members did more than merely rely on an official investigation by the BHPD. They directed Mr. Scott to ensure that the matter was thoroughly investigated. To this end, Mr. Scott separately interviewed the witnesses to the second stop and met with Rev. Anderson and Ms. Williamson. Thus, in each instance the council members took specific action to avoid the risk of constitutional injury: they not only reviewed the outcome of the BHPD investigations but initiated their own inquiry through the efforts of Mr. Scott.

While the plaintiffs contend that the council members should have done more, "[i]n virtually every instance where a person has had his or her constitutional rights violated . . ., a Section 1983 plaintiff will be able to point to something the city [official]'could have done' to prevent the unfortunate incident." *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). However, the test for Section 1983 liability is not based on a theory of "*de facto respondeat superior*" or an "endless exercise of second-guessing." *Id.* Instead, liability under Section 1983 attaches only where the official acted with deliberate indifference to the constitutional rights of the plaintiffs. In this case, viewing the evidence in a light most favorable to the plaintiffs, a reasonable fact finder could not find that the council members acted with

deliberate indifference. *See, e.g., Mackinney v. Nielsen*, 69 F. 3d 1002, 1008 (9th Cir. 1995): *Shaw v. Stroud*, 13 F. 3d 791, 801 (4th Cir.), *cert. denied*, 513 U.S. 813, 814 (1994); *Davis v. City of Ellensburg*, 869 F. 2d 1230, 1235 (9th Cir. 1989); *cf. Redman*, 942 F. 2d at 1447-48 (finding sufficient facts to support deliberate indifference where official knew or reasonably should have known of constitutional violations but took no action); *Oviatt ex rel Waugh v. Pearce*, 954 F. 2d 1470, 1477-78 (9th Cir. 1992) (same).

For essentially the same reasons, the council members are entitled to qualified immunity. A reasonable city official could have believed that the steps taken in response to the two Earthly complaints satisfied clearly established legal standards. The council members' conduct satisfies the standard of "objective legal reasonableness." *See, e.g., Harlow*, 457 U.S. at 815-19; *Shaw*, 13 F. 3d at 802-03. The district court properly entered summary judgment in favor of defendants Alexander and Reynolds.

IV.

It is undisputed that defendants Iannone and Curtis conducted the investigations of the plaintiffs' complaints in accordance with the procedures set forth in official BHPD policy handbooks. The plaintiffs also do not dispute that during the time-frame relevant to the alleged illegal stops defendants Iannone and Curtis provided for the training of subordinate officers in the proper standards for traffic and pedestrian stops. The plaintiffs'[sic] contend instead that the police supervisors participated in "sham" investigations.

Generally, a supervisor who reasonably relies on officially established procedures is entitled to qualified immunity. *See, e.g., Grossman v. City of Portland*, 33 F. 3d 1200, 1209-10 & n.20 (9th Cir. 1994); *Shaw*, 13 F. 3d at 801. There is

nothing in the record showing that the number of complaints alleging racially motivated stops, or the number of letters received from concerned citizens, was so unusual that the defendants' failure to deviate from official procedures amounted to deliberate indifference. *See Rizzo v. Goode*, 423 U.S. 362, 375 (1976). Likewise, there is a lack of evidence demonstrating that the procedures followed by the defendants to train and investigate subordinates were unreasonable under the circumstances. *Cf. Larez v. City of Los Angeles*, 946 F. 2d 630, 646 (9th Cir. 1991). Assuming that the police supervisors knew of Mr. Scott's misgivings regarding the investigation of Mr. Earthly's first complaint, the plaintiffs do not explain why this fact renders suspect the defendants' investigation and training of subordinate police officers.

Each of the six investigations resulted in findings that were supported by the statements of the officers involved, or by third party witnesses, or both. Plaintiffs have not pointed to any inconsistencies or "holes" in the investigations that should have put a reasonable supervisor on notice that the investigations were a "sham." *Cf. id.* at 647. Furthermore, there is no evidence to indicate that BHPD investigations always resulted in the exoneration of the police officers being investigated; in at least two of the investigations that are part of this record the officer under review was found to have acted improperly in some regard. *Cf. id.*

In sum, the police supervisors did not consciously disregard a plainly obvious risk that subordinate police officers were likely to cause the plaintiffs a constitutional injury. The defendants investigated each incident in accordance with standard operating procedures and provided continuous training on the proper standards for traffic and pedestrian stops. Viewed in a light most favorable to the plaintiffs, the record cannot reasonably support a finding that the defendant police supervisors acted with deliberate indifference. *See, e.g., Mackinney*, 69 F. 3d at

1008; *Shaw*, 13 F. 3d at 801; *Merritt v. County of Los Angeles*, 875 F. 2d 765, 770 (9th Cir. 1989); *Davis*, 869 F. 2d at 1235.

Similarly, defendants are entitled to qualified immunity. Under the circumstances, the police supervisors' actions in investigating and training subordinate officers were objectively legally reasonable. *See e.g., Shaw*, 13 F. 3d at 802-03. Therefore, the district court erred in denying the motion for summary judgment.

CONCLUSION

We reverse as to the council members and remand with instructions to enter summary judgment in favor of defendants Iannone and Curtis. We affirm the judgment for defendants Alexander and Reynolds.

REVERSED in part, AFFIRMED in part and REMANDED.

Each party to bear their own costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICK EARTHLY, an individual; AUDREY BOWEN, as Guardian ad Litem for Jerry Lafayette, a minor; YOLANDA NASH, as Guardian ad Litem for Brandon and Brent Nash, minors; CHERYL JONES, as Guardian ad Litem for Moacir Jones, a minor, RALPH JONES, as Guardian-ad Litem for Moacir Jones, a minor; JAYNE SOMOGY, as Guardian ad Litem for Jomo Kenyatta, a minor; RICHARD V. HILL, an individual; ANDREA HILL, an individual, Plaintiffs-Appellees, v. CITY OF BEVERLY HILLS; ALLAN L. ALEXANDER, City of Beverly Hills Mayor and City Council Member, individually and in his official capacity; VICKI REYNOLDS, City of Beverly Hills City Council Member, individually and in her official capacity, Defendants, and	)	**FILED** DEC - 1 1997 Cathy A.Catterson U.S. COURT OF APPEALS No. 96-55588

MARVIN IANNONE, City of Beverly Hills Chief of Police, individually and in his official capacity; ROBERT P. CURTIS, individually and in his official capacity,	)
Defendants-Appellants.	)

PATRICK EARTHLY, an individual; AUDREY BOWEN, as Guardian ad Litem for Jerry Lafayette, a minor; YOLANDA NASH, as Guardian ad Litem for Brandon and Brent Nash, minors; CHERYL JONES, as Guardian ad Litem for Moacir Jones, a minor, RALPH JONES, as Guardian ad Litem for Moacir Jones, a minor; JAYNE SOMOGY, as Guardian ad Litem for Jomo Kenyatta, a minor; RICHARD V. HILL, an individual; ANDREA HILL, an individual,	
Plaintiffs-Appellants,	No. 96-55884
v.	D. C. No. CV-95-07938-WDK
CITY OF BEVERLY HILLS; ALLAN L. ALEXANDER, City of Beverly Hills Mayor and City Council Member, individually and in his official capacity; VICKI REYNOLDS, City of Beverly Hills City Council Member, individually and in her official capacity,	ORDER
Defendants-Appellees.	

Before: HALL and T.G. Nelson, Circuit Judges, and WINMILL,* District Judge.

The panel has voted to deny appellee's petition for rehearing. Judge Nelson has voted to reject the suggestion for rehearing en banc and Judges Hall and Winmill recommend rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

---

* The Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 95-7938 - WDK Date: 4/2/96

Title: PATRICK EARTHLY, ET AL v. CITY OF BEVERLY HILLS, ET AL

PRESENT:
THE HONORABLE WILLIAM D. KELLER, JUDGE

KATHLEEN GAULT PETERSEN
Courtroom Clerk

DAVID LEE
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Robert Tanenbaum

ATTORNEYS PRESENT FOR DEFENDANTS:

Louis Miller

PROCEEDINGS: FURTHER TELEPHONIC HEARING ON DEFENDANTS' (ALEXANDER, REYNOLDS, IANNONE AND CURTIS) MOTION FOR SUMMARY JUDGMENT

Counsel are present telephonically and a further hearing is held on the Motion for Summary Judgment. The Court grants the Motion as to defendants Alexander and Reynolds. The Court denies the Motion as to defendants Iannone and Curtis.

IT IS SO ORDERED.

Initials of Deputy Clerk___

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM D. KELLER, JUDGE PRESIDING

PATRICK EARTHLY, et al.,	)	
Plaintiff,	)	
vs.	)	CV 95-7938-WDK
CITY OF BEVERLY HILLS, et al.,	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
TUESDAY, APRIL 2, 1996

DAVID M. LEE, CSR 9543, RPR
OFFICIAL COURT REPORTER
1653 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 626-5583

UNITED STATES DISTRICT COURT

D1

Excerpts From:

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
TUESDAY, APRIL 2, 1996

The following excerpt begins at U.S. District Court transcript, page 73, at line 14, and concludes at U.S. District Court transcript, page 78, at line 8.

==========

THE COURT: Okay. Here's the ruling regarding the officers. Quite obviously, I'm not endorsing anybody's viewpoint here, I'm only trying to report the position of the parties.

It's my view that the officers' motion for summary judgment should be denied, and that the council member and the mayor's motion should be granted. The reasons are as follows:

Number one, as it relates to the officers, there most assuredly was a duty to supervise. There is evidence of deliberate indifference, because you can't simply -- let me pause and say -- let me continue and then I'll come back.

They can't simply -- that is, the officers -- look to the investigation and state, "The following was done: It's been reviewed and we were not indifferent." You have to look to the context within which they undertook this investigation.

The investigation may well have been bona fide, but it wasn't under the plaintiff's theory of things. We are dealing here with circumstantial and direct evidence. The plaintiff's argument is that although they went through the investigation, they were just going through the motions and it was basically perfunctory and symbolic, rather than actual.

In that regard, it is indicated and argued by the plaintiff, or plaintiffs, that the context which informs the so-

called objective investigation, which comported with the duty incumbent upon the officers, the context is suggestive directly and circumstantially of a number of concerns which bely the professed objectivity. The circumstances are as follows:

Enumerable similar complaints, all leveled by blacks under somewhat similar circumstances over a considerable period of time; namely, a year and a half or more.

Number two, Scott's statement, albeit to the relative, I believe it's receivable. It's not hearsay; it's an admission by a party opponent. His statement was to the effect that Earthly was credible, and that the police are a state within a state over which I -- or he had no control.

When you give context to the statement attributed to him, the context was such that it suggested or indicated that there was a complaint leveled against the department for the alleged unreasonable stops, and it is within that context that the statement was attributed to Scott.

Now, I'm going to tell you, you doubt Scott said that, but that's not -- I'm not in a position to resolve that right now.

Next, the input from the community, to include the people at All Saint's church, which in effect vouched, at least, for Earthly and others.

The investigation -- well, my note doesn't make any sense to me.

Continuing, you have a man who -- an officer who didn't deny that there was a policy, according to one of the plaintiff's witnesses.

I know what the other point I wanted to make was.

You also have an allegation that an officer said, basically, "a black on the street was going to be treated differently in Beverly Hills."

Now, again, I don't know if these statements were made or not, but for purposes of summary judgment, they were made. And it's my view that you can't just look at what the investigation was and say, "Judge, because the investigation was undertaken in a facially objective way, the

defendant officers have not been deliberately indifferent."

That begs the question, the question being what's the context within which they undertook this, according to the plaintiff? I described the context, and that calls into context the credibility. Motion denied as to both officers.

The next issue is the mayor and councilwoman. They do not have individual supervisory power as it relates to the police department.

As I indicated, Section 2-3.201 provides that the police department shall be under the supervision of the police chief and the city manager, although the council, not the individuals, can indicate what duties are to be performed.

Well, strike the "although." The council, not the individuals, can indicate what duties are to be performed.

There was communicated to the council, qua council, the complaints of Mr. Earthly. These were referred, not surprisingly, to Mr. Scott. Mr. Scott undertook an exhaustive examination of the background, and then input the council.

It's unrebutted that the council was input regarding what the police department had done by way of their investigation. They were input regarding what Mr. Earthly's version was, and they were input regarding the input of the -- the version of Rector Anderson, and three witnesses were interviewed by Scott regarding the second stop. The essence of Scott's finding was that there was no wrongdoing.

I don't feel, under the circumstances, that there is any failure to investigate. I don't think there is any suggestion of deliberate indifference. To the extent that one could argue that there is deliberate indifference because they had notice, which I have found that they didn't, but alternatively, it could be argued, there is no causal connection because there is no authority on the part of the individual council members, under the state of the law extant in their municipal code, and as identified in this hearing.

In that regard, I looked also for support for my

position to the case of *Meade,* M-e-a-d-e *v. Grubbs*, 841 F. 2d 1512 at 1528, a Tenth Circuit, 1988 case, to the effect that if an official has no authority to remedy police misconduct, his failure to take action with respect to that misconduct cannot be said to cause the misconduct.

Gentlemen, I have concluded the hearing. You have the rulings and I think that ends it. I don't want any further argument.